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Sources of Law in the World Trade Organisation

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Abstract

World Trade Organisation (WTO) law is, by international law standards, a wide-ranging and complex body of law. This Paper deals with the issue of sources of law in the WTO. The principal source of WTO law is the Marrakesh Agreement Establishing the WTO, concluded on April 15, 1995 and in force since January 1, 1995. The author presents various sources of WTO law, such as: 1. The Marrakesh Agreement Establishing the World Trade Organisation; 2. General Agreement on Tariffs and Trade 1994; 3. General Agreement on Trade in Services; 4. Agreement on Trade-Related Aspects of Intellectual Property Right; 5. Other Multilateral Agreements on Trade in Goods.

Keywords: World Trade Organisation, Marrakesh Agreement, General Agreement on Tariffs and Trade, Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement on Textiles and Clothing, Agreement on Trade-Related Investment Measures.

Introduction

Modern discussion of the sources of international law usually begins with a reference to Article 38 (1) [1], of the statute of the International Court of Justice (ICJ) [2], which provides: the Court, whose function is, in accordance with international law, to decide the disputes which have been submitted, shall apply:

1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2) international customs as evidence of general practice accepted as law;
3) general principles of law recognised by civilized nations;
4) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law [3].

The WTO agreement is a "particular" international convention within the meaning of Article 38 (1) (a), as are the agreements and legal instruments annexed thereto. The agreements annexed to the WTO agreement are known as the WTO agreements or the covered agreements. The Dispute Settlement Understanding (DSU) governs resolution of disputes concerning the substantive rights and obligations of the WTO members under the covered agreements. According to the Article 38 (1) (a) the rules of the DSU "are expressly recognised by the contesting states" that are parties to WTO dispute settlement procedures.

The fundamental source of law in the WTO is, therefore, the texts of the relevant covered agreements themselves. All legal analysis begins there. As stated by the WTO Appellate Body, which was established by Article 17 of the DSU, "the proper interpretation of the Article is, first of all, a textual interpretation" [4].

The agreements, however, do not exhaust the sources of potentially relevant law. On the contrary, all of the subparagraphs of Article 38 (1) are potential sources of the law in the WTO dispute settlement. More specifically, prior practice under the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT) including reports of GATT dispute settlement panels; WTO practice, particularly report of dispute settlement panels and the WTO Appellate body; custom; the teachings of highly qualified publicists; general principles of law; and other international instruments all contribute to the rapidly growing and increasingly important body of law know as "WTO law".

While there is no explicit equivalent to Article 38 (1) in the Dispute Settlement Understanding or any other of the covered agreements, its terms are effectively brought into WTO dispute settlement by article 3.2 and 7 of the DSU. Article 3.2 specifies that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements "in accordance with customary of interpretation of public international law". Article 7 specifies the terms of reference for panels shall be "to examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB and to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" [5].

The "DSB" is the dispute settlement body, established by the DSU, with "the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the covered agreements" [6].

The Marrakesh Agreement Establishing the World Trade Organisation

The Marrakesh Agreement Establishing the World Trade Organisation (the WTO Agreements) is the most ambitious and far-reaching international trade agreement ever concluded [7]. It consists of a short basic agreement (of sixteen articles)

and numerous other agreements included in the annexes to this basic agreement. Realating to the relationship between the WTO Agreement and the agreements in the annexes as well as on the binding nature of the latter agreements, Article II of the WTO Agreement states:

1. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as multilateral trade agreements) are integral parts of this agreement, binding pm all member;
2. The agreements and associated legal instruments included in annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also a part of this agreement for those members that have accepted them, and are binding to those members. The plurilateral trade agreements do not create either obligations or rights for members that have not accepted them [8].

While the WTO agreement consists of many agreements, the Appellate Body in one of the first cases before it, Brazil-Desiccated Coconut (1997), stressed that the WTO agreement had been accepted by the WTO members as a single undertaking [9]. The provisions of these agreements represent "an inseparable package of rights and disciplines which have to be considered in conjunction" [10]. Thus, the WTO Agreements is seen as a single treaty. However, it should be noted that the agreements making up the WTO agreement were negotiated in multiple separate committees, which operated quite independently and without much coordination. Only towards the end of the Uruguay Round were some efforts made at coordinating and harmonising the texts of the various agreements. At that stage, however, the negotiators for fear of seeing disagreement re-emerge were often unwilling to change the agreed texts, and some "inconsistencies" or "tensions" between the texts remain. Note that Article XVI : 3 of the WTO agreement provides:

In the event if conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict [11].

Most of the substantive WTO law is found in the agreements contained in Annex 1. This annex consists of three parts. Annex 1A contains thirteen multilateral agreements on trade in goods; Annex 1B contains the General Agreements on Trade in Services (the GATS); and Annex 1C – the Agreement on Trade related Aspects of Intellectual Property Rights (the TRIPS Agreement). The most important of the thirteen multilateral agreements on trade in goods, contained in Annex 1A, is the General Agreement on Tariffs and Trade 1994 (the GATT 1994). The plurilateral agreements in Annex 4 also contain provisions of substantive law but they are as set out in Article II:3 of the WTO Agreement, quoted above only binding upon those WTO members that are a party to these agreements. Annexes 2 and 3 cover, respectively, the Understanding on Rules and Procedures for the Settlement of Disputes (the DSU) and the Trade Policy Review Mechanism (the TPRM), and contain procedural provisions.

General Agreements on Tariffs and Trade 1994

The General Agreements on Tariffs and Trade (GATT) 1994 sets out the basic rules for trade in goods. This agreements is, however, somewhat unusual in its appearance and structure. Paragraph 1 of the introductory text of the GATT 1994 states:

The General Agreements on Tariffs and Trade 1994 (GATT) shall consist of:

1) the provisions in the General Agreements on Tariffs and Trade, dated October 30, 1947;
2) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO agreements;
3) the Marrakesh Protocol to GATT 1994.

The GATT 1994 would obviously have been a less confusing and more user-friendly legal instrument if the negotiators had drafted a new text reflecting the basic rules on trade in goods as agreed during the Uruguay Round. If the negotiators had opted for a new text reflecting the basic rules on trade in goods, it would not have been possible to keep a lid of the many contentious issues relating to the interpretation and application of GATT provision [12].

The current arrangement obliges one to consult: (1) the provisions of the GATT 1947; (2) the provisions of relevant GATT 1947 legal instruments; and (3) the understandings agreed upon during the Uruguay Round in order to know what the GATT 1994 rules on trade in goods are. The negotiators were obviously aware that this arrangement might lead to some confusion, especially with regard to the continued relevance of the GATT 1947. They therefore felt the need to state explicitly in Article II:4 of the WTO agreement that: the General Agreement on Tariffs and Trade 1944 as specified in Annex A1 (hereinafter referred to as GATT 1944) is legally distinct from the General Agreement on Tariffs and Trade, dated October 30, 1947 (hereinafter referred to as GATT 1947).

It should be stressed that the GATT 1947 is, in fact, no longer in force. It was terminated in 1996. However, as explained, its provisions have been incorporated by reference in the GATT 1994.

The GATT 1994 contains rules on [13]: most favoured nation treatment (Article I); tariff concessions (Article II); national treatment on internal taxation and regulation (Article III); anti-dumping and countervailing duties (Article VI); Valuation for customs purposes (Article VII); customs fees and formalities (Article VIII); marks of origin (Article IX); the publication and administration on trade regulations (Article X); quantitative restrictions (Article XI); restrictions to safeguard the balanced of payment (Article XII); administration of quantitative restrictions (Article XIII); exchange arrangements (Article XV); Subsidies (Article XVI); State trading enterprises (Article XVII); governmental assistance to economic development (Article XVIII); safeguard measures (Article XIX); general exceptions (Article XX); Security exceptions (Article XXI); dispute

settlement (Article XXII and XIII); regional economic integration (Article XXIV); modification on tariff schedules (Article XXIII) and tariff negotiations (Article XXVIII); and trade and development (Article XXXVIII).

A number of these provisions have been amended by one of the understandings, listed of paragraph 1(c) of the introductory text of the GATT 1994 and contained in the GATT 1994. Finally, the Marrakesh Protocol, which is an important part of GATT 1994, contains the national Schedules of Concessions of all WTO members. In these national Schedules, the commitments to eliminate or reduce customs duties applicable to trade in goods are recorded. The protocol is over 25,000 pages long, and is a key instrument for traders and trade officials.

General Agreement on Trade in Services

The General Agreement on Trade in Services (the GATS) is the first ever multilateral agreement on trade in services [14]. It entered into force in January 1995 as a result of the Uruguay Round negotiations to provide for the extension of the multilateral trading system to services. All Members of the World Trade Organisation are signatories to the GATS and have to assume the resulting obligations [15]. Likewise, they are committed, pursuant to Article XIX of the GATS, to entering into subsequent rounds of trade liberalising negotiations. The first such Round started in January 2000 and was integrated later into the wider context of the Doha Development Agenda (the DDA). The GATS establishes a regulatory framework within which WTO members can undertake and implement commitments for the liberalisation on trade in services. The GATS covers measures of Members affecting trade in services.

Trade in services is defined in Article I:2 of the GATS as the supply of a service: (1) from the territory of one member into the territory of any other member (cross-border supply); (2) in the territory of one member to a service consumer of any other member (consumption abroad); (3) by a service supplier of on member, through a commercial presence in the territory of any other member (supply through a commercial presence); and (4) by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member (supply through the presence of natural persons) [16].

Agreement on Trade-Related Aspects of Intellectual Property Rights

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS), negotiated in the 1986–1994 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time [17]. One of the main objectives of the World Trade Organisation (WTO) is to facilitate the world's

trade and production. It enforces legally binding multilateral agreements on trade in goods, services, and trade-related aspects of intellectual property rights to manage global trade efficiently. At the end of the Uruguay Round of the General Agreement on Tariffs and Trade (the GATT) in 1994, the Trade Related Intellectual Property Rights (the TRIPS) agreement was implemented to regulate standards of Intellectual Property (the IP) regulations in the WTO member countries.

Economic theory suggests that intellectual property rights could either enhance or limit economic growth. However, evidence is emerging that stronger and more certain IPRs could increase economic growth and foster beneficial technical change, thereby improving development prospects (Maskus, 2000). Nevertheless, the significance of these growth effects would be dependent on the circumstances in each country. However, with the appropriate complementary policies and transparent regulation, the IPRs could play an important and positive role in promoting economic growth.

There are two central economic objectives of intellectual property protection. First, to promote investments in knowledge creation and business innovation by establishing exclusive rights to use and sell newly developed technologies, goods, and services. Second, to promote widespread dissemination of new knowledge by encouraging (or requiring) rights' holders to place their inventions and ideas on the market (Fink and Maskus, 2005) [18]. When there is a lack of intellectual property protection or weak intellectual property rights, firms are not willing to incur costs in research and commercialisation activities.

In economic terms, weak IPRs create a negative dynamic externality (Fink and Maskus, 2005), and fail to overcome the problems of uncertainty in R&D and risks in competitive appropriation that are inherent in private markets for information. In an economic context, it is socially efficient to provide a wide access to new technologies and products, when they are developed at marginal production costs. The IPR rules are important in-terms of encouraging creativity and innovation; to transfer technology on commercial terms to business enterprises in developing countries; to protect consumers by controlling the trade of counterfeit goods; and to improve international trade activities (WIPO, 2009). By strengthening the IPR regimes, either unilaterally or through adherence to the TRIPS agreement, developing countries attempt to attract greater inflow of technology. There are three interdependent channels through which technology is transferred across borders. These channels are international trade in goods, foreign direct investment (FDI) within multinational enterprises, and contractual licensing of technologies and trademarks to unaffiliated firms, subsidiaries, and joint ventures. Economic theory observes that technology transfers through each channel partly depend on local protection of the IPRs, albeit in complex and subtle ways (WIPO, 2009). Furthermore, countries with weak IPRs could be isolated from modern technologies and may be forced to develop technological knowledge using their own resources.

Other Multilateral Agreements on Trade in Goods

In addition to the GATT 1994, Annex 1A to the WTO agreement contains a number of other multilateral agreements on trade in goods.

These agreements include:

1) the Agreement on Agriculture [19], which requires the use of tariffs instead of quotas or other quantitative restrictions, imposes minimum market access requirements and provides for specific rules on domestic support and export subsidies in the agricultural sector;
2) The Agreement on the Application on the Sanitary and Phytosanitary Measures (The SPS Agreement), which regulates the use the WTO members of measures adopted to ensure food safety and protect the life and health of humans, animals and plants from pests and diseases;
3) the Agreement on Textiles and Clothing, which provided for the gradual elimination of quotas on textiles and clothing by January 1, 2005 (and is no longer in force);
4) the Agreement on Technical Barriers to Trade (the TBT agreement) which regulates the use by WTO Members of technical regulations and standards and procedures to test conformity with these regulations and standards;
5) the Agreement on Trade-Related Investment Measures (the TRIMS agreement), which provides that WTO members regulations dealing with foreign investments must respect the obligations in Article III (national treatment obligation) and Article XI (prohibition on quantitative restrictions) of the GATT 1994;
6) the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), which provides for detailed rules on the use of anti-dumping measures;
7) the Agreement of Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the Customs Valuation Agreement), which sets out in detail the rules to be used by national customs authorities for valuing good for customs purposes;
8) the Agreement on Preshipment Inspection, which regulates activities relating to the verification of the quality, the quantity, the price and the customs classification of goods to be exported;
9) the agreement on Rules of Origin, which provides for negotiations aimed at the harmonisation of non-preferential rules of origin, sets out disciplines to govern the application of these rules of origin, both during and after the negotiation on harmonization, and sets out disciplines applicable to preferential rules of origin;
10) the agreement on Import Licensing Procedures, which sets out rules on the use of import licensing procedure;

11) the Agreement on Subsidies and Countervailing Measures (the ASCM agreement), which provides for detailed rules on subsidies and the use of countervailing measures;
12) the Agreement on Safeguards, which provides for detailed rules on the use of safeguard measures and prohibits the use of voluntary export restraints.

Most of this multilateral agreement on trade in goods provide for rules that are more detailed than, and sometimes possible in conflict with, the rules contained in the GATT 1994. The interpretative note to annex 1A addresses the relationship between the GATT 1994 and the other multilateral agreements on trade in goods. It states: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and provision on another agreement in annex 1A to the Agreement Establishing the World Trade Organisation (referred to in the agreement in annex 1A as the WTO agreement), the provision of the other agreements shall prevail to the extent of the conflict" [20].

However, it is only where a provision of the GATT and a provision of another multilateral agreement on trade in goods are in conflict that the provision of the latter will prevail. Provisions are in conflict where adherence to the one provision will necessarily lead to a violation of the other provision and the provisions cannot, therefore, be read as complementing each other. While it is undisputed that a conflict exists when one provision requires what another provision prohibits, international lawyers tend to disagree pm whether such a conflict may exist where one provision expressly permits what another provision prohibits.

Conclusion

International trade law is a very complex and an ever expanding area. There are four levels of international trade relationships: unilateral measures (national law), bilateral relationships (Canada-United States Free Trade Agreement), plurilateral agreements and multilateral arrangements (the GATT/the WTO). The principal source of the WTO is the the WTO agreement in force since January 11, 1995. The WTO agreement is the short agreement establishing the WTO but contains, in its annexes, a significant number of agreements with substantive and procedural provisions, such as the GATT 1994, the GATTs, the TRIPS, agreement and the DSU.

However, the WTO agreement is not the only source of the WTO law. The WTO dispute settlement reports, acts of WTO bodies, agreements concluded in the context of the the WTO, customary international law, general principle of law, other international agreements, subsequent practice of the WTO members, teaching of the most highly qualified publicists and the negotiations history may all, to varying degrees, be sources of the WTO law. It is necessary to now, that not all of these elements of the WTO law are of the same nature or on the same legal footing. Some sources, such

as the WTO agreement and most of the agreements annexed to it, provide for specific legal rights and obligations for the WTO members that these members can enforce through WTO dispute settlement.

Other sources, such as the WTO dispute settlement reports, general principles of law, customary international law and non-WTO agreements do not provide for specific, enforceable rights and obligations but they do clarify and define the law that applies between the WTO members on WTO matters. So I want to note, that all multilateral WTO agreements apply equally and are equally binding to all WTO Members.

All multilateral WTO agreements, regulations and its sources apply equally and are equally binding to all WTO members, but it is very important how countries perform these regulations, and, to the author's concern, this is one of the most problematic issue in the WTO.

Pasaules Tirdzniecības organizācijas tiesību avoti

Kopsavilkums

Pasaules Tirdzniecības organizācijas (PTO) tiesību akti atbilst starptautisko tiesību standartiem; tie ir plašs un sarežģīts tiesību aktu kopums. Rakstā apskatīti PTO tiesību avoti. Galvenais PTO tiesību avots ir Marakešas līgums par Pasaules Tirdzniecības organizācijas izveidošanu. Tas noslēgts 1995. gada 15. aprīlī. Publikācijas autors iepazīstina ar vairākiem PTO tiesību avotiem, piemēram, – Marakešas līgumu par Pasaules Tirdzniecības organizācijas izveidošanu; ar Vispārējo vienošanos par tarifiem un tirdzniecību; Vispārējo vienošanos par pakalpojumu tirdzniecību; Līgumu par ar tirdzniecību saistītām intelektuālā īpašuma tiesībām un citiem daudzpusējiem nolīgumiem par preču tirdzniecību.

Atslēgvārdi: Pasaules Tirdzniecības organizācija, Vispārējā vienošanās par tarifiem un tirdzniecību, Līgums par ar tirdzniecību saistītajām intelektuālā īpašuma tiesībām, Nolīgums par tekstilizstrādājumiem un apģērbu, Līgums par ar tirdzniecību saistīto investīciju pasākumiem.

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